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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
In re

WILLIAM A. SAKS,

No. 99-13419

[Debtor](#)  (s).

Memorandum on Motion for Trustee

Debtor William Saks is a real estate developer. He filed the [Chapter 11](#)  petition commencing this case on November 9, 1999. He also filed a Chapter 11 petition for his wholly-owned corporation, Kinsak, at the same time. Movant Kristin Merrill-Saks is William Saks' former spouse. Her motions for appointment of a trustee pursuant to § 1104(a) of the [Bankruptcy Code](#)  in both cases are now before the court. She alleges that a trustee is in the best interests of the estate, and that Saks has been dishonest in pre-bankruptcy activities. Section 1104(a)(1) of the Bankruptcy Code requires the court to appoint a trustee if the debtor has been guilty of fraud, dishonesty or gross mismanagement. There is some evidence of such conduct. Before bankruptcy, Saks borrowed money from a partnership in which he was a general partner, although he subsequently repaid the loan. He also lost \$400,000.00 in an ill-advised investment. If the court were looking for cause to appoint a trustee, these actions could justify one. Section 1104(a)(2) provides independent grounds

for appointment of a trustee if it would be in the best interest of the creditors. It is here that the motion is sadly lacking, to the point that the court is very suspicious of Merrill-Saks' motives. The only possible reorganization for both cases would be the successful completion of a real estate development owned by Kinsak. Saks has the expertise, the desire and the motivation to complete the project. Contrary to Merrill-Saks' argument, the most likely action of a trustee would be to sell the project to another developer. Even if a trustee had the expertise and desire to complete the project, the extra layer of administrative expense would make it unlikely that a satisfactory dividend would be returned to creditors. The court is very concerned that Merrill-Saks is not a representative [creditor](#)ⁱ, that her interests are not what is best for the estate, and that she has misrepresented the effect of a trustee appointment in order to obtain her cookie-cutter "joinders." Appointment of a trustee in a Chapter 11 case is an extraordinary remedy. There is a strong presumption that the debtor should remain in possession. In re Cajun Elec. Power Coop, 69 F.3d 746, 749 (5th Cir.1995). The decision to appoint a trustee must be made on a case-by-case basis. In re Sharon Steel Corp., 871 F.2d 1217 (3d Cir. 1989). Although the word "shall" in § 1104(a) circumscribes the court's discretion, it does not eliminate it; the degree of dishonesty or mismanagement may be taken into consideration, along with other factors unique to the case. In re General Oil Distributors, Inc., 42 B.R. 402, 409 (Bkrtcy.E.D.N.Y. 1984). In this case, appointment of a trustee is clearly not in the best interests of the estate. While Merrill-Saks has produced some evidence of prepetition dishonesty and mismanagement by Saks, she has not shown that such conduct rises to the level which mandates a trustee.⁽¹⁾ As the court in General Oil Distributors noted: [M]ismanagement and even fraud all cover a wide spectrum of conduct. While under § 1104(a)(1) the court is not directly called upon to weigh the costs and benefits of appointing a trustee, it nevertheless cannot ignore competing benefit *and harm* that such an appointment may place upon the estate. [cite]. Implicit in a finding of incompetence, dishonesty, etc., for purposes of §1104(a)(1), is whether the conduct shown rises to a level sufficient to warrant the appointment of a trustee. Under [movant's] view, the court can not consider factors such as improvement in the competence of management and other kinds of reformed conduct, and the costs that the appointment of a trustee would bestow upon the estate. [Movant's] view would mandate appointment of a trustee for a single act of prepetition incompetence or dishonesty. As one court observed, "one would expect to find some degree of incompetence or mismanagement in most businesses which have been forced to seek the protections of chapter 11." (Emphasis in the original). For the foregoing reasons, Merrill-Saks' motion will be denied, without prejudice to motions made by other parties. Counsel for each debtor shall submit an appropriate form of order.

Dated: December 20, 1999

Alan Jaroslovsky

United States [Bankruptcy Judge](#)ⁱ

1. The court has placed controls on the liquid assets of the estate sufficient to insure that estate funds are not misused. Those controls will remain in

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